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NO. 92-236

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLARD PETERS and EARL DEJOURNETT, JR.,
Petitioners,

v.

THE STATE LOTTERY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT IN OPPOSITION TO CERTIORARI 2

CONCLUSION 4

APENDIX A1

Rule 14(h), Rules of the United States Supreme Court A1

TABLE OF AUTHORITIES

Cases **PAGE**

Fletcher v. Peck, 10 U.S. 87 (1810) 3

Toledo v. Reasonover, (1965) 5 Ohio St.2d 22 2

Statutes

Ohio Revised Code Section 3770.07 ..... 1, 3

Article I, Section 10, United States Constitution 3

Miscellaneous

Rule 14(h), Rules of the United States Supreme Court ... 2

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SUMMARY OF ARGUMENT

Petitioners seek to raise issues of due process and violation of the constitutional prohibition against impairing the obligation of contracts. However, neither issue was raised in the Ohio Courts until petitioners' application for rehearing in the Ohio Supreme Court. There is no justification for this Court reaching, on certiorari, issues that were not properly presented to the Ohio Courts.

In addition, each claim is without merit. There has been no retroactive application of a statute so as to impair the obligation of a contract or the misconstruction of a state statute so as to violate due process. While current Ohio Revised Code Section 3770.07 was amended subsequent to the game rules controlling petitioners' contracts with the Lottery, the amendment changed none of their substantive

rights. The amendment merely allowed the Lottery to fund other games from unclaimed prizes, whereas previously the unclaimed prizes were returned directly to the State Treasury. In either event, the Lottery statutes still required unclaimed winning selections to be treated as unclaimed prizes.

ARGUMENT IN OPPOSITION TO CERTIORARI

This case arises from a basic contractual dispute between petitioners and the Lottery over the amount of the prizes they won in their respective drawings. Despite attempting to put a constitutional overlay on their claims, the case involves state law issues as to the construction of the Lottery's statutes and rules, and not issues of constitutional dimension. At best, the case involves only these two petitioners on issues of contract which each level of the Ohio judiciary unanimously rejected. There could be no more wasteful expenditure of this Court's resources than to accept this case.

Most egregious is the failure of the petition to comply with Rule 14(h), Rules of this Court. Rule 14(h) requires the petitioners to identify in detail, where federal constitutional claims were presented in the state courts so that the petition, "will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." While petitioners do state that their application for rehearing contained the "obligation of contract claim" (Petition, page 10), petitioners never squarely admit to the Court that this is the first time the claim was ever set forth. It is cornerstone law in Ohio that the failure to raise and litigate an issue in the lower courts is an impediment, by waiver, to consideration of the issue by the appellate courts. *Toledo v. Reasonover,* (1965) 5 Ohio St.2d 22. As petitioners' obligation of contract claim was not even mentioned until rehearing, one cannot conclude that the Ohio Supreme Court considered or decided such issue on the merits.

Apparently recognizing their dilemma, petitioners appear to argue that they couldn't have known they had an "obligation of contract" issue until after the Ohio Supreme

Court had ruled, since, according to petitioners, the lower courts had never set forth a statutory analysis in rejecting their claims. (Petition, pages 10, 12). However, both the trial court and the court of appeals specifically cited to the operation of Ohio Revised Code section 3770.07 in rejecting petitioners' claims. (Petition Appendix, pages A14, 19-20, 31). Moreover, the record of the case shows petitioner Peters was advised by letter that his claim was being denied because of the unclaimed prize statute. (Petition Appendix, page A2). There is absolutely no reason why constitutional claims couldn't have been perceived and presented. The constitutional claims presented here are a last gasp chance to revive state law claims that have been firmly rejected.

The claim of constitutional violation is itself frivolous. The whole premise of the argument is that somehow petitioners would have won based on an analysis of the game rules, but for the Ohio Supreme Court's application of the amendment to Ohio Revised Code section 3770.07 retroactively to their case. The decision of the Ohio Supreme Court shows otherwise. While it is true that the Ohio Supreme Court mentioned Ohio Revised Code section 3770.07 in its decision, the Court also stated, "appellants' contentions must fail for yet other reasons." (Petition Appendix, page A5). Even if the Ohio Supreme Court was wrong in its application of Ohio Revised Code 3770.07, it was one of several alternative bases for decision.

More importantly, the Ohio Supreme Court's decision did not apply Ohio Revised Code section 3770.07 in a manner so as to violate Article I, Section 10 of the United States Constitution. To impair the obligation of contracts, a statute must operate retroactively to take away certain rights vested under the contract. *Fletcher v. Peck*, 10 U.S. 87, (1810). Here no substantive rights have retroactively been divested.

Petitioners' premise again is that somehow it is only the amendment to Ohio Revised Code section 3770.07 that defeats their claim. The amendment only allowed the Lottery Commission to utilize unclaimed funds in a new manner. The amendment is set forth in the Petition Appendix, pages

A45-48. Prior to the amendment, unclaimed funds were returned to the State Treasury. After the amendment, unclaimed funds could be used to fund other games. There always was an unclaimed prized statute which defeated petitioners' claims. There could not be an impairment of any right by the amendment of the statute, since the amended statute did not divest petitioners of any rights at all. At the time petitioners bought a lottery ticket, all lottery players were subject to the unclaimed prize. The same was true after the amendment.

CONCLUSION

There is neither procedural nor substantive merit to the petition. There simply is no justification why the Lottery should have to further defend an issue of state law which has unquestionably been decided in its favor, and even less justification why this Court should be burdened with it further. The petition should be denied.

Respectfully submitted,

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RULE 14(h), RULES OF THE UNITED STATES SUPREME COURT

(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.